Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1–22–1416–93
SHAIK DAUD J
25 JUNE 1994

Civil Procedure *— Summary judgment — Affidavit — Affidavit-in-reply — Time for filing — Whether under O 14 r 2(3) or O 32 r 13(2) — Rules of the High Court 1980 O 14 r 2(3), O 32 r 13(2)*

The plaintiff's O 14 summons and affidavit in support were served on the defendants on 23 February 1994. The second defendant filed and served an affidavit-in-reply on the plaintiff's solicitors on 8 June 1994. At the hearing of the O 14 application, counsel for the plaintiff objected to the second defendant's affidavit-in-reply on the ground that it had not been served in accordance with O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC'), ie it had not been served within 14 days from the date on which the plaintiff's affidavit was served on him. Counsel for the defendants, however, contended that the provisions of O 32 r 13(2) had no application to O 14 proceedings, relying on *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168.

Held, upholding the plaintiff's objection:

(1) Order 32 r 13(2)(b) applies to O 14 applications. As the plaintiff's affidavit in support had been served on the defendants on 23 February 1994, the affidavit-in-reply by the defendants ought to have been filed and served on or before 9 March 1994. The defendant had therefore violated O 32 r 13(2)(b) by failing to serve the affidavit-in-reply within the required 14-day period.

(2) Order 32 r 2(3) only refers to the affidavit in support of the O 14 summons which has to be served on the defendant but is completely silent as to the affidavit-in-reply by the defendant. As such, the service of the affidavit-in-reply by the defendant ought to follow the general procedure laid down in O 32 r 13(2)(b) which particularly refers to the affidavit-in-reply. It would be incorrect to say that O 32 r 13(2) has no application to O 14 proceedings. All affidavits-in-reply to O 14 applications must comply with O 32 r 13(2)(b), failing which the affidavits ought not to be considered.

[Bahasa Malaysia summary

Saman A 14 dan afidavit sokongan plaintif telah disampaikan ke atas defendan pada 23 Februari 1994. Defendan kedua telah memfail dan menyampaikan suatu afidavit jawapan ke atas peguamcara plaintif pada 8 Jun 1994. Pada pendengaran permohonan A 14 itu,

peguambela bagi pihak plaintif telah membuat bantahan terhadap afidavit jawapan defendan kedua atas alasan bahawa ia tidak disampaikan mengikut A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'), iaitu ia tidak disampaikan dalam masa 14 hari dari tarikh bila afidavit plaintif telah disampaikan kepada beliau. Bagaimanapun, peguambela bagi pihak defendan menegaskan bahawa peruntukan A 32 k 13(2) tidak terpakai kepada prosiding A 14, bergantung kepada *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168.

Diputuskan, membenarkan bantahan plaintif:

(1) Aturan 32 k 13(2)(b) terpakai kepada permohonan di bawah A 14. Oleh kerana afidavit jawapan plaintif telah disampaikan ke atas defendan pada 23 Februari 1994, afidavit jawapan oleh defendan seharusnya difail dan disampaikan pada atau sebelum 9 Mac 1994. Oleh itu, defendan telah mencabuli A 32 k 13(2)(b) dengan kegagalannya untuk menyampaikan afidavit jawapan di dalam tempoh 14 hari yang ditetapkan.

(2) Aturan 32 k 2(3) hanya merujuk kepada afidavit yang menyokong saman A 14 yang mesti disampaikan kepada defendan tetapi tidak menyebut langsung tentang afidavit jawapan oleh defendan. Dengan itu, penyampaian afidavit jawapan oleh defendan seharusnya mengikut prosedur am yang ditetapkan di dalam A 32 r 13(2)(b) yang merujuk kepada afidavit jawapan secara spesifik. Adalah tidak betul untuk menyatakan bahawa A 32 k 13(2) tidak terpakai kepada prosiding A 14. Semua afidavit jawapan kepada permohonan di bawah O 14 mesti mematuhi A 32 k 13(2)(b), jika tidak, afidavit itu tidak harus dipertimbangkan.]

[*Editorial Note*: In this case, the defendant's affidavit-in-reply was allowed in evidence as the judge had granted an abridgement of time.]

Case referred to

PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168 (not folld)

Legislation referred to

Rules of the High Court 1980 O 14 r 2(3), O 32 r 13(2)

PL Ng (*Che Mokhtar & Co*) for the plaintiff.
Balwant Singh (*Balwant Singh Sidhu & Co*) for the defendants.

Cur Adv Vult

Shaik Daud J: This case involves a short but rather important issue on service of affidavits in an application for summary judgment under O 14 of

A the Rules of the High Court 1980. The plaintiff, Wing Tiek Holdings Bhd, filed an O 14 summons in chambers for summary judgment against the defendants. The plaintiff's claim is for a sum of RM828,042.98 with interest for goods delivered and received by the defendants. The plaintiff's application is supported by an affidavit affirmed on 16 February 1994. Both the summons and affidavit in support were served on the defendants B on 23 February 1994. Thereupon an affidavit-in-reply affirmed by the second defendant was filed and served on the plaintiff's solicitors on 8 June 1994.

At the hearing of the O 14 application, Ms PL Ng, learned counsel for the plaintiff, objected to the affidavit-in-reply affirmed by the second C defendant from being admitted on the ground that it was served on 8 June 1994 and this is in violation of O 32 r 13(2)(b). Now O 32 r 13(2) provides:

> Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be D filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

E In the present case, therefore, O 32 r 13(2)(b) applies. Pursuant to this provision, the plaintiff's affidavit in support of his O 14 application having been served on the defendants on 23 February 1994, the affidavit-in-reply by the defendants ought to have been filed and served on or before 9 March 1994. In the present case, however, it was filed and served on F 8 June 1994. It would appear that the defendant has violated O 32 r 13(2)(b) in that he failed to serve the affidavit-in-reply within the required 14-day period.

Learned counsel for the defendants, Mr Balwant Singh, while conceding that the defendant's affidavit-in-reply was in fact filed and served beyond the 14-day limit, however, contends that the provisions of G O 32 r 13(2) have no application to O 14 proceedings. Therefore in the light of his contention, he submits that the second defendant's affidavit ought to be admitted and considered. As authority for this he cited the case of *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168. In that case the court was also considering the filing and serving of an H affidavit-in-reply to an O 14 application. Richard Talalla J after considering several cases on the principles of constructions held that the provisions of r 13(2) do not apply to an O 14 application. As I understand the decision, the learned judge is of the view that since it is an O 14 application one has to look at the procedure provided by that Order. He opined that under r 2(3) of the O 14 is provided the procedure for filing of affidavits. I Rule 2(3) provides that in an O 14 summons a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than four clear days before the return date. This, he says, being a specific rule, therefore, the subsequent general provisions of

r 13(2) are not intended to interfere with the prior special provisions of O 14 r 2(3). He adds that this is more so because of the express saving in r 13(2).

With respect I cannot agree with the views expressed in the above case. The provisions of r 2(3) of O 14 to my mind are clear. It clearly states:

> The summons, a copy of the *affidavit in support* and of any exhibits referred to therein must be served *on the defendant* not less than 4 clear days before the return day. (Emphasis added.)

When a plaintiff files on O 14 application, the registrar would give a return date. From the provisions of r 2(3) above it seems clear as crystal that the summons and affidavit in support of the summons and any exhibits referred to must be served on the defendant four clear days from that return date. Rule 2(3) only applies to the affidavit in support which is to be served on the defendant but is completely silent as to an affidavit-in-reply by the defendant. It only talks of an affidavit in support of the O 14 summons to be served on the defendant. In the light of this, it is my view that the service of the affidavit-in-reply by the defendant ought to follow the general procedure laid down in O 32 r 13(2)(b). Rule 13(2)(b) is also clear and particularly refers to the affidavit-in-reply. I am therefore of the view that it would be incorrect to say that r 13(2) has no application to O 14 proceedings.

In the present case since the affidavit-in-reply by the second defendant was filed and served on the plaintiff's solicitors on 8 June 1994, well beyond the 14-day limit provided for by r 13(2), I hold that it had violated this provision. It is my view that pursuant to r 13(2), all affidavits-in-reply to O 14 applications must comply with O 32 r 13(2)(b), failing which they ought not to be considered.

Plaintiff's objection upheld.

Reported by Anne Khoo